

Leclair (Migration) [2018] AATA 5092 (5 December 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr James Albert Leclair
CASE NUMBER:	1817827
DIBP REFERENCE(S):	BCC2016/1935517
MEMBER:	Kira Raif
DATE:	5 December 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations

Statement made on 05 December 2018 at 1:39pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – compelling circumstances – application not validly made within 28 days – senior age of applicant and sponsor – sponsor’s medical conditions – applicant main carer – decision under review remitted

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, Schedule 2, cl 820.211(2)(d)(ii), Schedule 3, criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Waensila v MIBP [2016] FCAFC 32

STATEMENT OF DECISION AND REASONS

Application for review

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 30 May 2018 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a national of Canada, born in December 1942. The applicant applied for the visa on 2 June 2016 on the basis of his relationship with his sponsor. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211. The delegate was not satisfied the applicant met Item 3001 and that there were compelling reasons to waive that requirement. The applicant seeks review of the delegate's decision.
3. The applicant appeared before the Tribunal on 5 December 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's partner and a friend. The applicant was represented in relation to the review by his registered migration agent. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

Relevant law

4. At the time the application was made, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
5. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl.820.211(2)(d).
6. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2).
7. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue in the present case is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria.

Does the applicant meet Schedule 3 criteria?

8. The applicant provided to the Tribunal a copy of the primary decision record. It indicates that the applicant's last substantive visa ceased on 1 May 2016 and the applicant confirmed this in oral evidence to the Tribunal. Having regard to that information, the Tribunal finds that the applicant last held a substantive visa on 1 May 2016. He was not the holder of a substantive visa at the time he made the application for the Partner visa on 2 June 2016. There is nothing to suggest that the applicant entered Australia as a holder of a Subclass 995 (Diplomatic) visa or as a special purpose visa holder. The Tribunal is not satisfied the applicant meets cl. 820.211(d)(i).
9. The applicant is required to satisfy the Schedule 3 criterion 3001 for the purpose of cl. 820.211(d)(ii).

10. There is nothing before the Tribunal to indicate that the applicant held an entry permit that was valid up to and including 31 August 1994. There is nothing to indicate that the applicant became an illegal entrant before 1 September 1994. There is nothing to indicate that the applicant ceased to hold a criminal justice visa on or after 1 September 1994 or that he entered Australia unlawfully on or after 1 September 1994. There is nothing to suggest that the last substantive visa held by the applicant was cancelled and the Tribunal has made a decision to set aside and substitute the cancellation decision.
11. The Tribunal has found that the applicant ceased to hold a substantive visa on 1 May 2016. The Tribunal finds that that date is the 'relevant day' within the meaning of subclause 3001(2)(c)(i) of Schedule 3. As the application for the Partner visa was made on 2 June 2016, the Tribunal is not satisfied that the application was validly made within 28 days after the relevant day. The Tribunal is not satisfied that the applicant meets Item 3001.
12. Clause 820.211(d)(ii) allows for this criterion to be waived if the Tribunal is satisfied that there are compelling reasons for not applying the criterion.

Compelling reasons

13. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
14. The expression 'compelling reasons' is not defined for these purposes. However, the reasons should be sufficiently convincing to move the decision-maker to exercise its discretion to waive the requisite criteria and the circumstances must be sufficiently powerful to lead a decision-maker to make a positive finding in favour of waiving the required criteria: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babicci v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
15. In his submission to the Tribunal of 27 November 2018 the applicant refers to his and his partner's age, noting that he is nearly 76 years old and his partner is 71 years of age. She was previously widowed while the applicant was divorced. They found love and companionship 'in their twilight'. Neither of them were sufficiently aware of the complexities of the migration laws in order to lodge the application when the applicant was holding a substantive visa and they did not engage a migration agent for assistance.
16. The applicant provided to the Tribunal a number of documents addressing various aspects of his relationship with the sponsor. For the purpose of this decision, and without a full assessment, the Tribunal is prepared to accept that the applicant and the sponsor are in a genuine spousal relationship and the Tribunal also accepts that the applicant and his partner are over the age of 70 and acknowledges their evidence that they have found love and companionship at their age. The Tribunal also acknowledges that the present relationship may be recognised as a long term one. The Tribunal does not consider that to be sufficient, in the circumstances of this case, to give rise to compelling reasons for the waiver.
17. The criteria in cl.820.211(2)(a) is that the applicant is the spouse or de facto partner of the sponsoring partner. This, in part, requires the applicant and the sponsor to be in a genuine, continuing and exclusive relationship. If an applicant does not hold a substantive visa and does not meet the Schedule 3 criteria, the requirement in cl.820.211(2)(d)(ii) to provide compelling reasons for not applying those criteria is in addition to the criteria in cl.820.211(2)(a). Accordingly, simply the fact that the parties are in a genuine and continuing relationship is not of itself a compelling reason for not applying the Schedule 3 criteria as it is already a criteria which must be satisfied in order to meet the criteria in cl.820.211(2)(a). If the

relationship itself can be considered a compelling reason for not applying the Schedule 3 criteria, it must be the particular aspects of the relationship which must provide a compelling reason for not applying the Schedule 3 criteria and not simply the fact that the parties are in a relationship.

18. Thus, as a genuine spousal relationship is the basic requirement for a partner visa application, the Tribunal is not satisfied that the genuineness, mutual commitment, emotional support, continuing nature and longevity of the parties' relationship are on their own, circumstances that should compel the Tribunal to not apply the Schedule 3 criteria. In the circumstances of this case, the Tribunal does not consider that the existence of a long term genuine relationship between the applicant and the sponsor, constitutes a compelling reason for the waiver. The Tribunal makes this finding while acknowledging, specifically, the applicant's and sponsor's age. That is, the Tribunal does not consider that the couple's age gives rise to compelling reasons.
19. The Tribunal accepts that the application was previously refused on a different ground and that considerable time has passed since the application was made. While any delay in the processing of a visa application is regrettable, the Tribunal does not consider that such delays constitute compelling reasons for the waiver of the Schedule 3 criteria.
20. The Tribunal also accepts that the applicant was unrepresented and that he may not have understood the legal requirements for visa grant. His evidence to the Tribunal is that he did not receive the letter from the Department and did not have the opportunity to respond. That may be the case, however, the fact that the applicant did not have the opportunity to respond to the delegate's request for information is not a compelling reason for the waiver in circumstances where the applicant has applied for review and has been given the opportunity to present his case.
21. The applicant told the Tribunal in oral evidence that the sponsor suffers from bad health. She has seen a specialist and she may require an operation in January 2019. She has difficulty walking and uses a cane around the house and a wheelchair when she goes outside and she cannot walk for longer periods. She has considerable pain. The applicant said that he does all the household chores, including the cooking and vacuuming, shopping and paying the bills. The applicant said that the sponsor's entire family are overseas but he sometimes asks friends to sit with the sponsor while he goes out but he tries to stay at home as much as he can. He will also take care of the sponsor following the operation.
22. The applicant provided detailed information about the sponsor's condition. He subsequently provided the sponsor's medical reports which refer to sciatica, prolapsed disk, glaucoma and spinal canal stenosis. The sponsor told the Tribunal that she lives alone in Australia and needs someone to be with her. Because of her sciatica, her health has deteriorated and the applicant is the one who take care of her, drives her to medical appointments and other engagements. She said that the applicant is always by her side.
23. The Tribunal accepts the applicant's evidence that he provides daily care and support to the sponsor. The Tribunal accepts that the sponsor has a serious medical condition which requires ongoing medication and treatment. The Tribunal accepts that the applicant is the primary caregiver and, importantly, that the sponsor has no other support available to her in Australia.
24. Having regard to the nature and severity of the sponsor's health condition and the fact that the applicant acts as the primary caregiver, the Tribunal has formed the view these circumstances give rise to compelling reasons for the waiver.

25. The Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl.820.211(2)(d)(ii).

Conclusion

26. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

27. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations

Kira Raif
Senior Member